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In The

Supreme Court of the United States

October Term, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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In their main brief, Petitioners discussed Congress' 1989 amendment to ERISA, Section 502(*l*), 29 U.S.C. § 1132(*l*), which requires the Secretary of Labor to assess civil penalties against any person who knowingly participates in a breach of fiduciary duty in an amount equal to twenty percent of "the applicable recovery amount." The term "applicable recovery amount" is defined in section 502(*l*)(2) as any amount which is recovered from a fiduciary or "any other person" who participates in a fiduciary breach in an action by the Secretary under Section 502(a)(5), 29 U.S.C. § 1132(a)(5). Petitioners then argued that since Section 502(a)(5) (which allows the Secretary to sue for equitable relief) has wording identical to that in Section 502(a)(3) (which allows participants to sue for equitable relief), the amendment makes clear that Section 502(a)(3) must have encompassed monetary relief against non-fiduciary aiders and abettors all along. (Pet. Br. 13-18).

Respondent Hewitt Associates ("Hewitt") and certain of the *amici* contend that the term "applicable recovery amount" can be explained as limited to an amount recovered from co-fiduciaries or parties in interest by the Secretary under Section 1132(a)(5); thus, that section does not necessarily encompass an action against knowing participants in fiduciary breaches. Hewitt also argues that

the penalty imposed by 502(*l*) was merely a revenue enhancing measure. They cite certain proposed Department of Labor regulations which allegedly show that 502(*l*)'s scope is limited. (Hewitt Br. 37-41).

Section 502(*l*) is not limited, as Hewitt contends, to co-fiduciaries and parties in interest. Section 502(*l*)(1) does not refer to fiduciaries (liable under sections 502(a)(2), 409 and 404), co-fiduciaries (liable under sections 502(a)(2), and 405), parties in interest (liable under sections 406 and 502(i)), disqualified persons (liable under 26 U.S.C. 4975), or to parties otherwise regulated or not regulated by ERISA. Instead, the statute imposes liability on *"any other person"* who knowingly participates in a breach of fiduciary duty. *See United States v. Gaggi*, 811 F.2d 47, 56 (2nd Cir. 1987) ("We presume that the use of different terminology within a body of legislation evidences a congressional purpose to differentiate."); *Beef Nebraska, Inc. v. United States*, 807 F.2d 712, 717 (8th Cir. 1986). Therefore, all persons who knowingly participate in breaches of fiduciary duty may be held liable under 502(*l*), not just those who are also liable under ERISA as fiduciaries, co-fiduciaries, parties in interest, or disqualified persons.

Congress did not enact section 502(*l*), as Hewitt contends, simply as a revenue enhancing measure. Congress enacted section 502(*l*) to strengthen enforcement of ERISA. Congress thought that the mandatory imposition of a civil penalty would deter potential breaches of fiduciary duty by fiduciaries and those who assist them in such breaches. Congress also sought to encourage the

courts to use section 502(*l*) to enforce the rights of plan participants. The Conference Report on OBRA states:

> The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their powers of [sic] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

H.R. Rep. No. 101-386, 101st Cong., 1st Sess., *reprinted in* 1989 U.S. Code Cong. and Admin. News 3018, 3035-3036. *See also* 165 Cong. Rec. H9603 (daily ed. November 21, 1989) (statement of Rep. Clay on enactment of ERISA § 502(*l*)).[1]

The enactment of section 502(*l*) is highly relevant to whether Congress has always intended knowing participants to be liable for all losses to plans. Subsequent legislative amendments are valuable guides for ascertaining the original intent of Congress in enacting legislation. *See Two Pesos, Inc. v. Taco Cabana Int'l. Inc.*, 112 S.Ct. 2753, 2765, n. 17, *reh'g denied*, 113 S.Ct. 2753 (1992) (Stevens, J., concurring) ("When several acts of Congress are passed

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[1] *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 157 (1985) (Brennan, J. concurring) ("ERISA was not so 'carefully integrated' and 'crafted' as to preclude further delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that the courts shall undertake it.")

touching on the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight . . . "); *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 380-81 (1969) ("subsequent legislation declaring the intent of an earlier Congress is entitled to great weight in statutory construction."). *See generally*, N. Singer, 2A Sutherland Statutory Construction § 49.11 (rev. 4th ed. 1984).

The term "applicable recovery amount" as defined in section 502(*l*)(2) cannot, as Hewitt contends, include "all losses" when applied to fiduciaries, but only restitution when applied to knowing participants. Such a construction would force the Court to give the phrase "applicable recovery amount" different meanings when applied to different persons. This is contrary to the principle of statutory construction that a word used in a statute be given a consistent meaning. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992). In addition, by adopting such a strained construction the Court would be rewriting section 502(*l*)(3) to read that the Secretary may consider the ability of a knowing participant "to make restitution." As adopted by Congress, the statute refers to the ability of a knowing participant "to restore all losses to the plan." Section 502(*l*)(3), 29 U.S.C. § 1132(*l*)(3).

The proposed Department of Labor regulations Hewitt cites support Petitioners' argument that the term "applicable recovery amount" in 502(*l*) encompasses actions under 502 against any person who knowingly

participates in a breach of fiduciary duty. The proposed regulations state that the Department of Labor "generally defines the term 'applicable recovery amount' to mean any amount which is recovered on behalf of an employee benefit plan or any participant or beneficiary of such a plan [from a fiduciary for breach of fiduciary duty] . . . *or from a person who knowingly participated in such a breach or violation*." The proposed regulations further state that the applicable recovery amount "paid by such a breaching fiduciary *or knowing participant* will include amounts paid to the plan by such person *which represent losses suffered by the plan*. . . . " 55 Fed. Reg. 25,288; (emphasis added).

The Secretary of Labor's consistent and long-standing position is that ERISA provides a right of action for monetary relief against persons who knowingly participate in a breach of fiduciary duty. As a plaintiff in *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979), the Secretary of Labor successfully argued that knowing participants in fiduciary breaches may be held liable under ERISA in the first and seminal decision so holding. The Department of Labor has strictly adhered to that position for thirteen years.

Clearly, the Department's interpretation is a "permissible construction of the statute." It should be afforded great weight. *Pension Ben. Guar. Corp. v. LTV Corp.* 110 S.Ct. 2668, 2676 (1990) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). *See also Amer. Paper Inst. v. Amer. Elec. Pow. Serv. Corp.*, 461 U.S. 402, 422 (1983). Thus, rather than attempting to read unwarranted implications into the Department of Labor's proposed regulation, the Court should defer to the Department's longstanding

position that persons who knowingly participate in breaches of fiduciary duty may be held liable for all plan losses.

Hewitt gives great significance to the fact that Congress did not explicitly overrule *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988). (Hewitt Br. 23.) Petitioners have shown that this argument is unpersuasive. (Pet. Br., 17.) Rather than focusing, as Hewitt would, on what Congress did not enact, the Court should give effect to the legislation that Congress *did* enact. To give effect to section 502(*l*), an underlying cause of action against knowing participants for breaches of fiduciary duty must necessarily exist in sections 502(a)(3) and (a)(5). ERISA, including section 502(*l*), "must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992). Section 502(*l*) must be read in light of the rest of the statute and the rest of the statute must be read in light of section 502(*l*). *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

II. "APPROPRIATE EQUITABLE RELIEF" INCLUDES RESTORING ALL LOSSES TO A PLAN RESULTING FROM A FIDUCIARY BREACH.

Hewitt argues that the term "equitable relief" in section 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5), does not include the remedy of restoring all losses to a plan resulting from a fiduciary breach, because such a remedy is "legal" and not "equitable." (Hewitt Br. 25-32). This construction of section 502(a)(3) is erroneous. The statute's wording and structure make it clear that Congress

considered the remedy of restoring all losses to a plan caused by a fiduciary breach, or a knowing participation in such breach, a form of equitable relief.

The broad and open-ended wording of section 502(a)(3) itself supports a liberal construction rather than the cramped one asserted by Hewitt. In reading section 502(a)(3), the Sixth Circuit said:

> [t]he term "other appropriate equitable relief" implies a broad range of remedies. We adhere to the principle, "endorsed repeatedly by the federal judiciary" that "when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important Congressional goals."

Warren v. Society Nat. Bank, 905 F.2d 975, 982 (6th Cir. 1990) (quoting in part from *Cia Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985)). Section 503(a)(3)'s broad provision for "appropriate equitable relief" to "redress" violations of the statute is a mandate to the courts to fashion all remedies which are appropriate to enforce the Act. Respondent gives no persuasive reason why this language should not be construed to include make-whole relief against those who knowingly aid fiduciaries in carrying out violations of ERISA.

Hewitt relies heavily on this Court's decision in *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 110 S.Ct. 1339 (1990). In *Terry*, the Court held that a damage claim for breach of the duty of fair representation and breach of contract was more like a traditional "legal" than

an "equitable" claim for purposes of the Seventh Amendment right to jury trial. *Terry*'s Seventh Amendment analysis, however, is inapposite in determining how *Congress* may have used the term "equitable relief" in a specific statute. This Court has emphasized that ERISA "abounds with the language and terminology of trust law," and that ERISA's legislative history confirms that Congress made applicable to ERISA principles developed in the law of trusts. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). In using the term "equitable relief" in ERISA, it is likely that Congress had in mind its settled meaning in trust law. As *Terry* makes clear, damages for breach of trust have always been considered equitable relief in trust law. *Terry*, 110 S.Ct. at 1348 n.8. *See also, United States v. Mitchell*, 463 U.S. 206, 226-227 (1983); G. Bogert & G. Bogert, Law Of Trusts and Trustees, § 862 (2nd Ed. 1982), p. 27; Restatement (Second) of Trusts, §§ 205-212 (1959).[2]

The relevant inquiry is what Congress intended by the term "equitable relief" in the specific context of ERISA. Indeed, *Terry* distinguishes cases holding that monetary claims for back pay under Title VII of the Civil Rights Act of 1964 are "equitable", noting that "Congress specifically characterized back pay under Title VII as a

[2] *See also Warren v. Society Nat. Bank, supra*, 905 F.2d at 982: "[Under] the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages." (citing *Russell*, 473 U.S. at 154, n. 10, Brennan, J. concurring) "... Our position is supported by decisions of other courts of appeals finding that equitable relief includes monetary damages where required to afford complete relief." *Id.*

form of 'equitable relief'." The *Terry* Court quotes the specific language of Title VII's remedial provision, which provides for reinstatement of employees with or without back pay or for *"any other equitable relief* as the court deems appropriate." 110 S.Ct. 1348-1349. (quoting 42 U.S.C. § 200e-5(g)) (emphasis added).

Section 409(a) of ERISA uses virtually the same wording as the remedial language of Title VII quoted in *Terry*. Section 409(a), 29 U.S.C. 1109(a), provides that a fiduciary who commits a fiduciary breach shall be liable "to make good to such plan" "any losses" to the plan resulting from each breach and

> shall be subject to such *other equitable* or remedial relief as the court may deem appropriate. . . . ERISA § 409(a), 29 U.S.C. § 1109(a) (emphasis added).

Congress' reference in section 409 to "other equitable relief" shows that Congress deemed restoration of losses to a plan to be a form of "equitable relief." Construing "appropriate equitable relief" under section 502(a)(3) to include restoration of "all losses to the plan" is consistent with judicial interpretations of section 409(a) that hold that claims for losses to a plan are equitable claims for jury trial purposes. See *Diduck v. Koszycki & Sons Contractors, Inc.*, 12 E.B.C. 1762, 1781 (S.D.N.Y. 1990) ("the nature of the relief afforded pursuant to section 409 is equitable and not legal"); *Kahnke v. Herter*, 579 F. Supp. 1523, 1526-28 (D. Minn. 1984) (Section 409 provides essentially equitable relief). If restoration of losses to a plan under section 409 is equitable relief, then restoration of losses to a plan under section 502(a)(3) is also "equitable relief."

Finally, as petitioners have already argued (Pet. Br. 18), Congress' provision for a "waiver" of the civil penalty imposed by section 502(*l*) shows that the phrase "appropriate equitable relief" in sections 502(a)(3) and (5) includes the remedy of the restoration of "all losses to the plan." Under section 1132(*l*)(3)(B), the Secretary may waive or reduce the civil penalty imposed by section 502(*l*) if imposition of the penalty would interfere with the non-fiduciary's ability "to restore all losses to the plan without severe financial hardship." This waiver criterion would be meaningless if the non-fiduciary were not liable, in the first instance, for "all losses to the plan."

III. CONGRESS DID NOT INTEND THAT NON-FIDUCIARIES WHO KNOWINGLY PARTICIPATE IN FIDUCIARY BREACHES SHOULD LEAD A CHARMED LEGAL EXISTENCE FREE OF ALL LIABILITY, STATE OR FEDERAL.

Hewitt and its supporting *amici* cite the description of ERISA in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1984), as a "comprehensive and reticulated" statute in support of their argument that ERISA does not authorize claims against non-fiduciaries who knowingly participate in fiduciary breaches. (Hewitt Br. 12-13.) However, as the Second Circuit recently stated in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 280 (2nd Cir. 1992):

> *Russell*'s statements regarding the limited authority to fashion remedies is taken out of context. Giving the Supreme Court's limiting language broad application would defeat Congress' effort to shape relief based on trust law principles where appropriate. [Citations omitted]

Diduck notes that principles of trust law are appropriately considered in construing ERISA's remedial provisions where they are consistent with the legislative scheme and further the remedial objectives of the statute. Unlike the situation in *Russell*, petitioners here seek relief that is plainly consistent with ERISA's scheme and which furthers ERISA's important purposes.

The Second Circuit in *Diduck* found that a right of action against non-fiduciaries furthered two major ERISA goals: the uniform development of law in the area of employee benefit plans (*Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)) and the compelling federal interest in ensuring that employee benefit plan participants obtain the benefits that they are promised. (*H.R.Conf.Rep. No. 386, 101st Cong., lst Sess. 432-33, reprinted in 1989 U.S. Code Cong. and Admin. News 3018, 3035-36.*)

The court thought it extremely improbable that Congress meant to preclude any remedy, either under ERISA or under state law, against those who knowingly participate in fiduciary breaches. The court reasoned that if ERISA preempts state law claims for aiding and abetting fiduciary breaches, and at the same time provides no remedy, then "[t]he compelling federal interest in ensuring that employee benefit plan participants and beneficiaries obtain the benefits to which they are entitled will be thwarted. . . . " *Diduck*, 974 F.2d at 281. In such a scenario, non-fiduciary aiders and abettors "will be permitted a charmed existence that never was contemplated by Congress." *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2nd Cir. 1984).

In essence, Hewitt argues for just such a charmed existence.

On the other hand, if ERISA does not preempt state law claims against non-fiduciaries for aiding and abetting fiduciary breaches, then the Congressional goal of uniformity of application of ERISA would be thwarted: the fiduciary would be subject to liability under federal law and the non-fiduciary knowing participant would be liable under varying standards of state law. *Diduck*, 974 F.2d at 281.

Nevertheless, Hewitt argues that a claim against non-fiduciaries who knowingly participate in fiduciary breaches is inconsistent with ERISA's scheme, which is based, according to Hewitt, on the distinction between fiduciaries and non-fiduciaries. (Hewitt Br. 13-19.)

Hewitt's argument begs the question. Petitioners do not dispute that ERISA's fiduciary responsibility provisions represent the core of the Act's remedial scheme. Nor do petitioners dispute that by enacting ERISA's fiduciary responsibility provisions Congress sought primarily to protect plan assets against misconduct and to ensure that participants received their promised retirement benefits. To effectuate these Congressional goals, however, participants must have a cause of action against non-fiduciary aiders and abettors. Indeed, the Conference Report on the 1989 OBRA Amendment that added section 502(*l*)(1) says as much:

> It *remains* the intent of Congress that the courts use their power [to] fashion legal and equitable remedies that not only protect participants and beneficiaries but *deter* violations of the law as well.

H.R.Conf.Rep. No. 386, 101st Cong., 1st Sess. 433, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 3018, 3036 (emphasis added). The fact that ERISA distinguishes between fiduciaries and non-fiduciaries does not insulate from liability a non-fiduciary who knowingly participates in a breach of fiduciary duty.

Hewitt and certain *amici* contend that ERISA provides petitioners with sufficient remedies against non-fiduciaries who engage in misconduct. (Hewitt's Br. 15-18.) The Act itself, however, rebuts this contention.

The Joint Board of Actuaries, to which Hewitt points, has the power only to suspend or terminate the enrollment of an actuary for failure to discharge his or her duties. ERISA § 3042(b), 29 U.S.C. § 1242(b). This sanction provides no redress to *petitioners* for their lost retirement benefits.[3] Nor does it provide a remedy for the severe underfunding of the Kaiser Steel Retirement Plan, which required the PBGC to assume responsibility for substantial financial liabilities. Concerning the "other" ERISA remedies which Hewitt alleges, in this case the district court held that Hewitt could not be sued as an ERISA fiduciary and that ERISA provides no remedy for Hewitt's alleged breach of professional actuarial duties. (J.A. 22-25, 26-28.) The Court of Appeals affirmed. (J.A.

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[3] Petitioner Mertens suffered a reduction in his monthly pension from $2,016.00 to $521.00, petitioner Bandrowski from $1,907.00 to $670.00, petitioner Clarke from $2,567.00 to $1,103.00, and petitioner Franz from $1,426.00 to $478.00. (J.A. 6-7).

38) Under ERISA, petitioners' only remedy against Hewitt is the remedy they now seek in this Court.

Contrary to Hewitt's argument, ERISA's entire remedial scheme demonstrates that Congress considered private enforcement by plan participants vital to ERISA's effective enforcement. ERISA grants participants extensive enforcement authority virtually identical to that of the Secretary of Labor. Indeed, in enacting section 502(*l*) in 1989, Congress emphasized the need for strengthened enforcement and deterrence of ERISA violations, and that that need "applies not only to the Department of Labor, but to judicial oversight of *private rights of action* affecting employee benefit plans." *H.R. Rep. No. 101-386, 101st Cong., 1st Sess., reprinted in 1989 U.S. Code Cong. and Admin. News 3018, 3035-36;* emphasis added.

IV. CONCLUSION.

Congress' 1989 amendment of ERISA, which requires the Secretary of Labor to assess civil penalties against non-fiduciaries who knowingly participate in a breach of fiduciary duty, confirms Congress' original intent to impose liability on aiders and abettors of fiduciary breaches. A cause of action under ERISA against non-fiduciaries who knowingly participate in fiduciary breaches is essential to deter violations of ERISA's fiduciary responsibility provisions, and to ensure that plans can

recover losses caused by such violations. Petitioners respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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